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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY,
STAR PUBLISHING COMPANY,
TUCSON NEWSPAPERS INCORPORATED,
ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINION BELOW

The District Court rendered no opinion. Its findings of fact (A. 69), conclusions of law (A. 100), and judgment and decree (A. 102) are reported at 280 F.Supp. 978.[1]

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1. As used herein, "A" refers to the Appendix to appellants' and appellee's briefs, "F." to the trial court's findings of fact, and "C.L." to the trial court's conclusions of law. "Tr." refers to the trial transcript, "G.X." to the Government's exhibits, and "D.X." to the appellants' exhibits. "Stip." refers to the "Stipulation and Order Re: Exhibits" dated April 16, 1966, pursuant to which the trial court ordered that the documents listed in the stipulation be admitted in evidence. "M." refers to the "Motion to Affirm" filed by the Government in this Court.

JURISDICTION

This is a civil antitrust suit brought by the United States under sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. It was tried in the United States District Court for the District of Arizona before Judge James A. Walsh, sitting without a jury. The judgment of the District Court was dated and entered January 31, 1968.[2] A notice of appeal was filed by appellants in the District Court on February 23, 1968, and by order dated April 18, 1968, the time to docket the appeal was extended by Mr. Justice William O. Douglas to and including June 29, 1968. Appellants docketed the appeal on June 28, 1968, and on October 21, 1968, this Court noted probable jurisdiction. Jurisdiction is conferred by section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 304-311.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2, provide:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *."
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, provides:

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2. The judgment has been stayed by the District Court pending disposition of this appeal.

> "* * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

QUESTIONS PRESENTED

During the past several decades economic forces have steadily cut down the number of competing daily newspapers throughout the United States. From 288 in 1930, the number of cities served by dailies competing on both the journalistic and commercial levels had shrunk to 181 in 1940, to 61 in 1960, and to 43 in 1965. Large numbers of competing dailies have failed, leaving the field to one survivor; others have been merged into their competitors, leaving either a single newspaper or two newspapers under common ownership. To fight these pressures and the rush toward concentration of news and editorial voices, a growing number of competing dailies have entered into agreements whereby their advertising, circulation and printing functions are merged to reduce costs, while the independence and competition of their news reporting and editorial functions are preserved. This case tests the validity of such an agreement.

By the agreement in question, the publishers of the *Arizona Daily Star* and the *Tucson Daily Citizen*, competing dailies serving Tucson, Arizona, in 1940 transferred their operating assets and all their business functions to a jointly owned operating company but continued their separate identities and editorial and news functions.

The question here is whether the Court below erred in holding that section 1 of the Sherman Act made this agreement per se illegal, when application of the rule of reason would have resulted in sustaining the agreement in view of the economic forces which prior to the agreement had caused *Citizen* to operate at a loss and to be unable to continue on its own, and which in the years since 1940 would have caused *Citizen* to fail, leaving Tucson with but a single daily news and editorial voice.

A related question is whether the Court erred in ruling that defendants, by entering into and operating pursuant to the 1940 agreement, also conspired to and did monopolize the publication of daily newspapers in Tucson in violation of section 2 of the Sherman Act.

A final question relates to a stock option agreement executed contemporaneously with the operating agreement. Under it the stockholders of each newspaper had first option to purchase the stock of the other. In 1964 the Citizen stockholders exercised their option and acquired the Star stock. The District Court found that such acquisition was a violation of section 7 of the Clayton Act and ordered divestiture. If the operating agreement is required to be modified to eliminate the provisions found objectionable by the District Court, the question is whether the mode of divestiture should also be modified to permit a sale of Citizen stock as an alternative.[3]

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3. Because appellants intended promptly to dispose of *Star* they do not concede that the acquisition violated section 7 of the Clayton Act. However, they do not oppose divestiture of *Star* if the operating agreement remains substantially intact so as to preserve the viability of *Citizen*.

STATEMENT OF THE CASE

The disappearance of competing daily newspapers and the retreat to either a single newspaper or, at best, two newspapers under common ownership is a widespread phenomenon (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717). The causes are well known—the evolution of the daily newspaper into a highly intricate product accompanied by vast increases in costs, and the inroads into advertising revenue made by magazines, radio, and more lately television (Tr. 701-702, 740-744; Tr. 844-847). These forces have stilled one journalistic voice after another.

Evidence in this case shows that the number of cities served by two entirely separate competing dailies in succeeding years was:[4]

Year 1920—552
1930—288
1940—181
1945—117
1954— 87
1960— 61
1965— 43

During the years 1937-1943, which bracketed the date of the operating agreement in question here, 81 dailies completely merged with their competitors, 161 suspended all operations, and 109 switched to weeklies, producing (against new entries) a net reduction in the United States of 216 daily newspapers (D.X. 128, Tr. 2069, 2070).

A few years earlier there had appeared the first efforts of newspapers to combat these forces and preserve their

4. D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717.

separate and competitive editorial voices by cost-saving mergers of their business operations, as the alternative to the weaker paper's completely succumbing (D.X. 46, Tr. 2456). The two dailies in Albuquerque thus merged their business operations in 1933 (D.X. 183, pp. 4, 24, A. 519, 524, Tr. 2459), followed by two dailies in El Paso in 1936 (Tr. 873, 879, A. 247, 248). By 1940 there were four such operating agreements, including the one in question here; by 1945, eleven; by 1954, nineteen; and by 1966, twenty-two.[5]

Another aspect of the trends appears in the fact that in 1945 there were six cities in Tucson's present population range (200,000-300,000) in which there were more than one metropolitan daily operating separately at the advertising, circulation and mechanical levels, as well as in news and editorial opinion (D.X. 122, A. 485, Tr. 2051, 2053). In 1965 there was one (D.X. 63a, A. 478, Tr. 715, 717); and today there are none (A. 618).[6]

The impact of economic forces upon newspapers is compounded by the unique characteristics of the newspaper business. As the District Court found, circulation revenues do not and cannot support the newspaper (F. 67). Approximately 75% of gross revenues come from the sale of adver-

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5. D.X. 121, A. 484. Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; Tr. 2094-2095; Tr. 2451-2455; D.X. 46, Tr. 2456; Defendants' Offer of Proof with Respect to Joint Operating Agreement between the Miami Herald and the Miami News (Feb. 13, 1967), A. 618.

6. The *Star* and *Citizen* are "metropolitan" newspapers which carry, among other things, "complete and accurate coverage of local, state, national and international news • • • " (F. 64). The cost of producing a metropolitan newspaper is much greater than the cost of producing a small town newspaper, which carries primarily local news (Tr. 756-758; see also *United States v. Times-Mirror Company* (C.D. Cal. 1967) 274 F.Supp. 606, 614, affirmed (1968) 390 U.S. 712). In a few cities competing local newspapers are able to survive because of the vast difference in their cost of operation as compared to metropolitan dailies (Tr. 757; Tr. 858-859, A. 239) and because occasionally local dailies are supported by job printing arrangements, subsidies from outside sources, or affiliations with television stations (Tr. 858, A. 239).

tising (F. 67). At the same time, advertising revenues depend on circulation; the larger the circulation, the more advertisers are attracted and the more they are willing to pay (F. 68). Circulation depends chiefly on news and editorial content, with a large part being played by wire service, columnists and special features (F. 65, F. 66, F. 68; Tr. 2432, A. 373).

Hence there is an inherent spiraling tendency: more and better news reporting, editorial opinion and features mean more circulation; more circulation means more advertising revenues; more advertising revenues mean more money wherewith to support and enlarge news and editorial staffs and to buy attractive features (F. 65, F. 66, F. 68). Conversely, less money to spend on news and editorial staffs and features tends to depress circulation; diminishing circulation means less advertising revenues; and that in turn means still less money for reporters, editors and features (F. 68).

Except in the largest markets, when two newspapers compete for advertising, diverging spirals are inevitably set in motion (Tr. 694-695; Tr. 847, A. 234). The paper with the larger circulation gets the larger share of the available advertising funds and therewith can improve the comparative attractiveness of its paper and increase its share of the circulation market (F. 65, F. 66, F. 68). The share of its competitor in both advertising and circulation tends inevitably to decrease (F. 68; Tr. 864-865, A. 243).

Two other characteristics work to the disadvantage of the weaker newspaper. One is the fixed market area; the losing competitor cannot compete by selling its product elsewhere. The other is the instant obsolescence of the product; the competitor cannot hold over sales of today's newspapers to wait for a better market tomorrow.

This, in general, is the pragmatic context of the agreement in question here, with respect to which the Sherman Act is to be interpreted. The agreement was entered into in 1940 between Citizen Publishing Company ("Citizen") and Star Publishing Company ("Star"), which respectively published the only two daily newspapers in Tucson, the *Tucson Daily Citizen* and the *Arizona Daily Star* (F. 17, F. 10, F. 11, F. 71). Each is a newspaper of general circulation (F. 10, F. 11, F. 64). The *Star* is published in the morning, including Sunday, seven days a week (F. 10; G.X. 40, Stip.). The *Citizen* is published in the evening, six days a week, Monday through Saturday (F. 11; G.X. 41, Stip.).

Prior to 1940, the two newspapers were completely separate from each other in all functions—editorial, news reporting, advertising and circulation (Tr. 771, A. 184; Tr. 1536-1544; Tr. 1592; G.X. 15f, pp. 87-88).

For many years, Citizen Publishing had operated at a loss (F. 12). From 1932 to 1940, its operating losses averaged $21,121 per year (D.X. 161, A. 499, Tr. 1874, 1878). These losses reflected Citizen's inability successfully to compete in the sale of advertising, even when cutting rates to do so (F. 13, F. 178; Tr. 1540-1543, A. 291). From 1935 to 1939, Star Publishing sold 50 per cent more advertising space (F. 13). Citizen was unable to cut its losses by raising advertising rates (F. 176).

Citizen also trailed Star in circulation, because Star published a Sunday edition, while Citizen did not (D.X. 27e, Stip.). Citizen discontinued its Sunday edition in 1933, because the edition was losing money (Tr. 763, A. 177; Tr. 771, A. 184). *Star* with more pages (G.X. 25, p. 4-TNI- 1939, Tr. 278) was more attractive to subscribers at a weekly

rate for seven daily issues (20¢) of only five cents more than the *Citizen* for six issues (15¢) (G.X. 54, Stip.).

In 1936 Citizen's sole owner and publisher died, and the company was sold under a term contract to William H. Johnson, a New York newspaper broker, and William A. Small, a partner in the Chicago advertising firm that from time to time had represented Citizen (F. 14, Tr. 785-791, A. 194).[7]

Small and Johnson advanced the newspaper $25,000 in working capital (F. 14). Thereafter they made additional loans to offset operating deficits (F. 12). By the end of 1937, these additional loans totaled $53,211 (D.X. 3b, Stip.).

During the period 1936 to 1938, Johnson had been in Tucson as editor and publisher of *Citizen* (Tr. 793, A. 200; D.X. 50a, Stip.). From 1937 to 1939, Small made efforts to attract additional financing but was unsuccessful (F. 14). In 1939, he moved to Tucson (F. 14) and took over management of *Citizen* (D.X. 10, Stip.), working without a salary (F. 15). The operating deficits continued. As of December 31, 1939, Citizen Publishing owed approximately $79,000 to its stockholders for advances of working capital; it had current liabilities of over $47,000, as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand (D.X. 1d, A. 457, Stip.). Its liabilities exceeded its assets, exclusive of goodwill, by some $53,480 (*ibid.*).

Off and on since 1936, Johnson and Small had had discussions with William R. Mathews, publisher of *Star*, concerning the possibility of a joint operation of the two newspapers (F. 16; Tr. 649-654, A. 147). Mathews knew that Citizen was insolvent and unable to generate sufficient in-

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7. William A. Small is the father of appellant William A. Small, Jr.

come to meet its operating expenses (Tr. 763-764, 771, A. 177, 184). He had consistently rejected the suggestion that Star merge with Citizen (Tr. 765-768, A. 179), because, as he testified at trial, he thought that it was good for Tucson to have two separate newspaper voices and two points of view (Tr. 776-777, A. 188). He believed that eventually Citizen would have to suspend publication, because of its continued losses (Tr. 764, 768, A. 178, 181).

Citizen's situation continued to worsen. As of March 31, 1940 (about the time the agreement in question was executed), Citizen owed debts of more than $109,000, including accounts payable of $13,507 and salaries of over $8,000 (F. 15; D.X. 5, A. 461, Stip.). Its liabilities exceeded its assets, exclusive of goodwill, by $81,034 (D.X. 5, A. 461, Stip.), an increase of some $27,550 since the preceding December (D.X. 1d A. 457, Stip.).

By July 1, 1940, when the agreement became effective, Citizen was overdrawn $1,232 in its bank account and had $75 cash on hand (D.X. 185, A. 510, Tr. 2004, 2006). For the six months ending June 30, 1940, its net operating losses totaled $13,131 or $2,188 per month (D.X. 2f, Stip.). Its assets, other than goodwill, had shrunk from $80,409 on December 31, 1939 (D.X. 1d, A. 457, Stip.), to $54,393 three months later (D.X. 5, A. 461, Stip.) and to $47,425 by July 1, 1940 (D.X. 185, A. 510, Tr. 2004, 2006).

The Operating Agreement

Following a pattern already established in Albuquerque in 1933 and in El Paso in 1937 (F. 21; Tr. 652-653, 655-656, A. 149, 151; Tr. 768; A. 181; Tr. 794-795, Tr. 815, A. 201, 215), the two companies on March 28, 1940, executed an agreement to be effective July 1, 1940 (F. 17; G.X. 2, A. 30, Stip.). After reciting the parties' belief that 15 years' ex-

perience had shown that the Tucson area could not profitably support two completely separate newspapers and their hope that by unifying production and distribution the two newspapers could continue editorially independent and separately owned, each conveyed to the other a joint interest in their respective operating assets so that all equipment and machinery used to produce the two newspapers would be owned jointly (F. 22, F. 27; G.X. 2, par. 4, A. 30, Stip.). Pursuant to the agreement, a separate corporation, Tucson Newspapers Incorporated ("TNI"), was organized to conduct all business, advertising, circulation and production operations theretofore conducted by the two newspapers separately (F. 18, F. 27, F. 28, F. 32, F. 33, F. 34). The agreement provided for the integration, possession, management and operation of all jointly owned assets by transferring possession and control to TNI (F. 27, 28) and assigning all accounts receivable to be used as working capital (F. 27).

After 1940 TNI performed all functions other than news and editorial (F. 18, F. 31). Each newspaper paid the expenses of its own news and editorial departments and retained complete and exclusive control over its own staffs of these departments and over the contents of its own newspaper (F. 18, F. 30, F. 31).[8]

Pursuant to the agreement, TNI sold the advertising, promoted the circulation, and paid the bills for the joint operating functions (F. 19, F. 30). The balance of the circulation and advertising revenues was distributed to the two

8. The court found that since 1940, Star and Citizen have been engaged in intense rivalry with each other in the composition of news and editorial materials (F. 31). They have frequently been on opposite sides as respects national and local elections and a great variety of other issues (e.g., D.X. 50g-50yy, Stip.; D.X. 50eee-50zzzz, Stip.).

newspapers in the following ratio: for the first 10 years, Star was to receive 70% and Citizen 30% of the first $100,000, the remainder to be divided equally; after 10 years, Star was to receive 55% and Citizen 45% of the first $200,000, the remainder to be divided equally (G.X. 2, par. 8(c), A. 30, Stip.).

The agreement by its terms is self-renewing and cannot be terminated except at 25-year intervals, and then only upon mutual consent and two years' prior notice given by both parties (G.X. 2, par. 13, A. 30, Stip.).

Effects of the Operating Agreement

Predictably, the merger of the commercial operations accomplished only a slight decrease in production expenses (e.g., costs of newsprint, ink, lead and press room salaries (F. 34; D.X. 176, A. 508, Tr. 1914, 1920), since these had to be incurred for each paper as before. But the merger produced substantial cost savings through combining the advertising and circulation departments (ibid.) In the first three years, the combination of these respective departments reduced average annual advertising costs by more than 43% and average annual circulation costs by more than 19% (D.X. 176, A. 508, Tr. 1914, 1920).

As the District Court found (F. 46):

> "The operating agreement has been successful. Since the inception of this agreement in 1940, the financial condition of Citizen Publishing has steadily improved. In 1964, Citizen Publishing and Star Publishing were in sound financial condition and have provided the Tucson area with two newspapers of high quality."

During the 24 years following 1940, overall costs and revenues increased (D.X. 9x, A. 463, Stip.). Nevertheless, the milline rate (the cost to advertisers of distributing one

agate line of advertising space to an actual or hypothetical million readers (F. 43)) for national display advertising in the two papers declined from $4.26 in 1941 to $3.42 in 1964 (D.X. 147b, A. 494, Tr. 2160, 2161), and the milline rate for local display advertising from $4.03 in 1941 to $3.45 in 1964 (D.X. 225, A. 515, Tr. 2261, 2263; D.X. 227, A. 517, Tr. 2273, 2274). Thus, the advertisers got more for their money than before.[9]

The court found:

> "Tucson advertising agencies and advertisers, including those who advertise in areas other than Tucson, who testified in this case believe that TNI rates are reasonable. Those who advertise in both Star and Citizen are satisfied with the combination rate and prefer to deal with TNI as a single entity rather than with two separate advertising departments representing the respective newspapers, because the present arrangement reduces costs to the advertiser by reason of time and expense involved in preparing and placing advertising material * * *" (F. 44).

The merger of the business functions of the two newspapers, besides saving the costs of duplicate advertising and commercial staffs, did away with the divergent, spiraling movement.

Circulation has increased since 1940, generally in proportion to the increase in occupied housing units in the Tucson area (F. 117; D.X. 174, A. 505, Tr. 1401, 1403). In 1964 the

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9. To an advertiser, the value of a unit of time on radio or television or of a line of advertising space in printed media is measured in terms of "coverage" or number of persons reached (F. 141). Consequently, if, as in the case of the Tucson newspapers, coverage should increase faster than the rate charged for the unit of advertising time or space, the real cost of the advertising message will decrease (D.X. 225, A. 515, Tr. 2261, 2263; D.X. 227, A. 517, Tr. 2273, 2274).

circulation of the papers equalled 80% of such housing units (F. 117).[10]

Although the papers have grown in number of pages (e.g., D.X. 150b, Stip.), newsstand rates have changed but little; both papers since 1957 have cost 10¢ per issue weekdays and the Sunday *Star* 15¢ per issue since 1947. Home deliveries of the *Citizen* cost 45¢ per week; the *Star* (including Sunday) cost 55¢ (G.X. 54, Stip.).

TNI was able to supply funds to the two newspapers in sufficient amounts to enable them to continue as independent and often controversial journalistic voices (F. 31, F. 46, F. 64). Profits reached a level comparable to those of newspapers in the average medium-sized city.[11]

Effect of Cancellation of the Operating Agreement

If the operating agreement were to be canceled, the two newspapers would revert to the divergent, spiraling condition previously described (D.X. 163, A. 501, Tr. 1818, 1848; Tr. 2429-2435). Mere joint use of circulation trucks and presses would be no solution to expanded costs (D.X. 163, A. 501, Tr. 1818, 1848; D.X. 166, A. 503, Tr. 1898, 1901; D.X. 176, A. 508, Tr. 1914, 1920; Tr. 753-754, A. 172; F. 34; Tr. 2445-2446, A. 382). Single staffs would have to be replaced by duplicate advertising sales staffs, duplicate circulation sales staffs, and duplicate accounting, billing and collecting staffs (D.X. 163, A. 501, Tr. 1818, 1848; D.X. 171,

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10. This circulation reached a high of 100% in 1952 but declined after the introduction of television in Tucson in 1953 (D.X. 174, A. 505, Tr. 1401, 1403).

11. Since 1959, the combined profits of Star and Citizen before taxes have been approximately 20% of revenues (F. 36). This figure is somewhat less than the before-tax profits of the "average medium city newspaper" (Circulation approx. 50,000):

1958	20.7%
1964	19.2%
1965	23%

(Editor & Publisher, Apr. 16, 1966, p. 11).

Tr. 1367, 1389; Tr. 1370-1376; Tr. 1624-1627, 1669, A. 297, 307; Tr. 1720-1733). These staff salaries presently comprise 60% to 84% of the cost of these departments (D.X. 9x, A. 463, Stip.). In addition, separate composing rooms and dummy desks would be required, because commercial competition demands protection against premature disclosure of the size, location and contents of the advertiser's ads (Tr. 1635-1640, A. 302; Tr. 1775-1776; Tr. 2445, A. 382). Separate plants would also be required, because TNI's present facilities are not large enough to house two entirely separate advertising, circulation and business departments (Tr. 667-668; Tr. 1371, A. 284; Tr. 1629-1630; Tr. 1743-1744).

The uncontradicted evidence was that with joint use of production facilities and circulation trucks alone (i.e., without joint advertising, circulation and business departments) Citizen would have sustained operating losses of $35,249 in 1962, $120,076 in 1963, and $75,923 in 1964 (D.X. 163, A. 501, Tr. 1818, 1848). Significantly, the District Court found that it is "impossible to predict with any substantial degree of completeness" what the operating results of either newspaper would be in such a situation (F. 192).

The Court also found that the organization of two separate advertising departments would not only increase the cost of operation of the papers (F. 195) but also would increase the cost to advertisers (F. 194). This would undercut the ability of the two newspapers to compete with other advertising media (Tr. 378-381; Tr. 1311-1313; Tr. 1503-1505; Tr. 1525-1526; Tr. 1642-1643). The District Court found that all major advertising media in the Tucson area are in active competition with each other (F. 138, F. 142, F. 143), and that advertisers and advertising agencies are conscious of relative costs in the selection of media (F. 140, F. 141, F. 142, F. 143). From 1952 to 1966 the number of

advertising media available in the Tucson area has substantially increased (F. 126) while TNI, when compared with radio and television, has been losing position in its competition for the advertising dollar (F. 167, F. 173, F. 175).

That Citizen would be unable to extricate itself from a regressive spiral is apparent from the findings and the undisputed evidence. The District Court found that if the two newspapers were commercially separated, the fact that the Stars owns the Sunday edition would give the Star an advantage in competing with Citizen for circulation and advertising (F. 193). The pro forma analysis of profits and losses for the two papers showed there would be substantial annual losses for Citizen contrasted with even more substantial annual profits for Star (D.X. 163, A. 501, Tr. 1818, 1848).

In short, the uncontradicted evidence showed that without the operating agreement Citizen would eventually fail and Star, having the competitive advantage, would become the surviving daily newspaper in Tucson.[12]

The 1965 Stock Acquisition

When the operating agreement was executed in 1940, the stockholders of Star and Citizen entered into a stock agreement which provided, among other things, that so long as the operating agreement remained in effect, neither group of stockholders would sell stock interests in their respective newspapers to outsiders without first giving to the other group an option to purchase the stock at the same price and

12. Tr. 771, A. 184; Tr. 861-862, 863-866, A. 241, 243; Tr. 1049-1054; Tr. 1108-1110; Tr. 1181-1182; Tr. 1204-1205; Tr. 1441-1442; Tr. 1541-1543, A. 292; Tr. 1627-1629, A. 299; Tr. 1866-1869, A. 322; Tr. 1871-1874, 1992; Tr. 2429-2438, A. 371; D.X. 191, p. 46, A. 554, Tr. 2463; D.X. 163, A. 501, Tr. 1878, 1848.

upon the same terms as any bona fide offer received (F. 47; G.X. 4, A. 50, Stip.).

The purpose of the stock agreement, as admitted by the Government, was to assure a compatible relationship in the operating company.[13]

In 1964, the two families that owned Star decided to sell their stock (F. 50; Tr. 2402-2403, A. 357; D.X. 50ccc, Stip.). After entering negotiations for a sale of Star to the owner of a newspaper in Missouri, they asked the Citizen stockholders for a waiver of their option (Tr. 2402-2404, A. 357). The Citizen stockholders delivered a waiver after ascertaining that the prospective new owner would be compatible in the joint operation, would treat Citizen as an equal in the operating company and would permit delivery of the *Sunday Star* to Citizen subscribers as had been the case at one time in the past (D.X. 38, A. 472, Stip.; Tr. 2404, 2407, A. 358; Tr. 2409, A. 360). However, these purchase negotiations with the Star stockholders ultimately fell through (D.X. 50ccc, Stip.).

Later the same year the Star stockholders announced that an Ohio-based newspaper chain, Brush-Moore Newspapers, Inc., would be the new owner of Star (F. 50; Tr. 2408, A. 359) and again the Citizen stockholders were asked for a waiver (D.X. 41, Stip.; D.X. 50ccc, Stip.). At a meeting with Tom Brush, the Ohio chain's representative, the Citizen stockholders understood that he too was receptive to equalizing Citizen in the operating company and to delivery of the *Sunday Star* to *Citizen* subscribers (Tr. 2409-2410, A. 360).

At a subsequent meeting between Brush-Moore principals and Citizen stockholders, however, Tom Brush stated that

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13. Brief in Support of Plaintiff's Motion for Summary Judgment, page 8, A. 107; see also D.X. (50ccc, Stip.).

the Citizen stockholders had completely misinterpreted his earlier statements, that he was not agreeable to what had been suggested, and that the only reason Brush-Moore was willing to buy Star, and pay $10,000,000 for it, was because it very well recognized the "advantage the TNI operating agreement gave them and they weren't about to change it" (Tr. 2412-2413, A. 362). Brush-Moore indicated that it was buying Star to obtain, among other things, a very substantial tax write-off (Tr. 2413, A. 363).

Later, the Citizen stockholders requested a slight extension of the option, so that they might further consider a waiver (D.X. 41, Stip.). In response, Tom Brush wrote a letter to Small, Sr., stating that he did not want to make it any easier to exercise the option, but that he also did not want "to be obdurate about it, just out of petty meanness" because "[t]here'll be time enough for meanness afterwards" (D.X. 41, Stip.). The letter went on to say that Brush-Moore was "not coming with our hats in our hands"; it implied that sweeping changes would be made in the operating company, that the president and vice-president of Citizen Publishing and other officials of TNI were relatively incompetent in comparison to Brush-Moore "professionals" and that one or more would be removed from TNI (D.X. 41, Stip.; D.X. 218, A. 513, Tr. 1707, 1708; Tr. 2416-2418, A. 364). In all these circumstances, the Citizen stockholders refused to waive their option in favor of Brush-Moore (D.X. 50ccc, Stip.; Tr. 2423, A. 367). They believed Brush-Moore would be completely undesirable as business associates in the operating company and that they would not be able to get along with Brush-Moore personnel (D.X. 50ccc, Stip.; Tr. 2418-2419, A. 365).

Their intention, when the option was exercised on December 21, 1964, was to sell Star at the earliest possible moment

to another publisher, with whom they felt they could work harmoniously on the TNI level (Tr. 2420, A. 367). The Citizen stockholders had received many inquiries from newspaper publishers interested in purchasing Star for at least the option price (Tr. 803, 806-808; Tr. 2415-2416). Thus they were confident that Star could be promptly resold without loss (Tr. 808, A. 210). Prior to the acquisition and before the Government filed its complaint, they informed the Justice Department of their willingness to dispose of their Star stock (Tr. 2422).

The 1940 stock agreement required that acquisition pursuant to the option be on the same terms as offered by Brush-Moore (G.X. 4, par. 2, A. 50; F. 52). The Brush-Moore purchase agreement provided that Brush-Moore was purchasing the shares for investment and that it would not transfer the shares to the public for five years, and that none of the shares would be sold to the public or to anyone unless registered under applicable securities acts, or unless an opinion of counsel that such registration was not necessary had been obtained (F. 53; G.X. 8, pp. 15-16, A. 390, Stip.). The purpose of the warranty was to assure the sellers of Star stock that the transfer would be an exempt transaction under section 4(1) of the Federal Securities Act of 1933, as amended (F. 54; G.X. 8, pp. 15-16, A. 390, Stip.).

The Citizen stockholders discussed these provisions with their attorney; he expressed the opinion that they were intended to protect the Star stockholders from the registration requirements incident to a public offering (Tr. 2401, A. 356). The Citizen stockholders realized that the provisions might complicate their efforts to dispose of Star (Tr. 814, A. 214), but had no doubt that disposition could be accomplished (Tr. 803, 806-808; Tr. 2401-2402, A. 356).

On these facts the Government instituted the present proceeding. Named as defendants were Citizen Publishing Company, owner of the *Citizen* (F. 3); Star Publishing Company, until 1966 the owner of the *Star* (F. 4); Tucson Newspapers Incorporated, the operating company (F. 5); Arden Publishing Company, the corporation organized to acquire the Star stock (F. 6) and into which Star was liquidated in 1966 (F. 7), and the present owner of the *Star;* and William A. Small, Jr., the present sole stockholder of Arden Publishing and a principal stockholder of Citizen Publishing (F. 8).

The Proceedings Below

The complaint (A. 22), filed January 4, 1965, charged that defendants since March 28, 1940, had been engaged in a combination and conspiracy to restrain and monopolize commerce in the dissemination of news and the sale of advertising. The complaint alleged that the combination and conspiracy was formed and effectuated (compl., par. 13, A. 22):

> (i) through entry by Citizen Publishing and Star Publishing into an operating agreement on March 28, 1940;
>
> (ii) by the organization of TNI and its subsequent management and operation of Star and Citizen pursuant to said agreement;
>
> (iii) through entry by the owners of Citizen Publishing into a stock agreement with the owners of Star Publishing on March 28, 1940; and
>
> (iv) by the exercise, on December 21, 1964, by the stockholders of Citizen Publishing of the rights granted by said agreement and by the organization of Arden Publishing to acquire the stock of Star Publishing.

The complaint further charged that the acquisition by Arden of the stock of Star may substantially lessen competition or tend to create a monopoly in violation of section 7 of the Clayton Act (compl., par. 14, A. 22).

Defendants' answer denied the charging allegations (A. 61).

In February, 1965, the District Court enjoined defendants from disposing of Star pending final judgment on the merits or until further order of the Court (docket sheet, entry 14, A. 2).[14]

In April, three and one-half months after the complaint was filed, the Govemnment moved for summary judgment on the section 1 issue contending that the operating agreement was illegal per se (docket sheet, entry 20, A. 3). The motion relied upon the pleadings (including the operating and stock agreements attached as exhibits to the complaint), 1963 financial statements of Citizen and TNI, and the Brush-Moore Newspapers agreement to purchase the Star stock (Brief in Support of Plaintiff's Motion for Summary Judgment, p. 4, A. 104). The motion asserted that the distribution of the revenues of TNI to the newspapers in designated ratios was "profit pooling," that consolidation of the advertising and circulation departments was "price fixing" and that a provision in the agreement that the parties thereto would not engage in any other business in conflict with the agreement constituted "market allocation" (Brief, supra, pp. 13-24, A. 104).

In opposition defendants submitted affidavits showing that for a number of years prior to 1940, Citizen had operated at a deficit (Butterbaugh Aff., A. 130; Small Aff.,

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14. Pursuant to stipulation of the parties, the District Court earlier this year entered an order continuing in effect its February, 1965, injunction against disposition of Star pending final disposition of all proceedings on appeal.

A. 113; Chambers Aff., A. 115; Manno Aff., A. 118); that these deficits had reduced its assets far below its liabilities (Butterbaugh Aff., A. 130); that but for advances by its stockholders Citizen would have been unable to continue operations (Small Aff., A. 113; Chambers Aff., A. 115; Butterbaugh Aff., A. 130); that without the operating agreement Citizen's only alternatives would have been suspension or a sale to Star, since no outside publisher would have purchased Citizen to operate it separately (Manno Aff., A. 118; Kander Aff., A. 127); that the operating agreement was similar to those in effect in at least 20 other cities (Manno Aff., A. 118; Kander Aff., A. 127); that Star and Citizen entered the Tucson agreement after investigation in detail of other operating agreements (Chambers Aff., A. 115); and that without the economies obtained through merged business operations, Citizen would not be able to survive in the present Tucson market (Manno Aff., A. 118; Tucker Aff., A. 133; Strong Aff., A. 135).

Appellants contended that the rule of reason should apply and that the affidavits presented genuine issues of material facts.

The Government did not contradict these affidavits. It contended that the business justification for the operating agreement, the beneficial effects for the community and the motives of the parties were all immaterial (A. 104). Disregarding the provisions of the agreement which explained that its purpose was to maintain the two newspapers as editorially independent and separately owned, and disregarding the fact that the Tucson area could not support two separately published daily newspapers, the Government took the position that the newspapers had to return to their pre-1940 organization, except for joint use of presses and circulation trucks (Brief, supra, pp. 24-25).

It made no showing that Citizen could survive with the joint use of presses and circulation trucks alone. (A. 104).

The Court accepted the Government's contentions and granted the motion for summary judgment (Tr., Jan. 24, 1966, pp. 2-3):

> "THE COURT: Yes, the Court finds there was price fixing, there was more or less profit pooling, and other per se violations as to Section 1, there isn't any issue."

After argument on the motion for summary judgment, the parties entered into a stipulation of facts which provided in part (G.X. 1, A. 386, Stip.):

* * * * *

> "Prior to 1940 Star and Citizen published their respective newspapers independently. Since then, however, the Star and the Citizen have been operated pursuant to an 'Operating Agreement' entered into on March 28, 1940. This agreement is Exhibit A to the complaint; an extension to Exhibit B. Execution of the agreement and the extension is admitted by the defendants. As extended, the agreement runs until June 1, 1990.
>
> "The parties specified that each newspaper would retain its separate identity and that the news and editorial departments of each would remain separate. The agreement provides for the formation by Star and Citizen of an agency corporation, defendant Tucson Newspapers, Inc., whose function is, 'To manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible.' The agreement provides that the stock of T.N.I. will be owned in equal shares by Citizen and Star and that each will place two

representatives on its Board of Directors. A fifth director, and his eventual replacement, are named in the agreement. The agreement further provides that all profits realized from the publication of the Star and the Citizen will be pooled in a specified ratio [footnote omitted], and that during its term Star and Citizen will engage in no other publishing business in Pima County or 'engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement.'"

* * * * *

In its order specifying issues for trial the court excluded all section 1 issues. Under the order the trial was limited to (1) whether appellants had conspired to monopolize, or had monopolized, the publication of daily newspapers of general circulation in Tucson, in violation of section 2 of the Sherman Act, (2) whether the acquisition of the stock of Star in 1965 tended to create a monopoly, or substantially to lessen competition, in violation of the Clayton Act, and (3) relief (A. 140).[15]

Thus, on the section 1 issues the court excluded all evidence of the failing condition and hopeless prospects of the Citizen, of the economic forces at work, of the social virtue and benefits of preserving two independent journalistic voices in Tucson, of the practical necessity of the operating arrangement if that independence were to be preserved, of similar solutions adopted and continuing to be adopted in other cities under parallel conditions, of the

15. See also Order on Defendants' Motion for Order Granting Relief from Portion of Pretrial Order, dated Jan. 26, 1966, A. 141; and Pretrial Order No. 2, dated Feb. 15, 1966, A. 142.

nonaction of the Government in those situations, and of the consequences of eliminating the operating agreement.[16]

At the close of the trial, appellants moved the Court to set aside its section 1 summary judgment on the ground, among others, that the evidence adduced on the other issues demonstrated that the operating agreement was not a per se violation of that section (docket sheet, entry 155, A. 17). The motion was denied (minute order Dec. 28, 1966, docket sheet, A. 18).

Thereafter the court entered its conclusions (1) that the operating agreement constituted a "price-fixing," "profit-pooling" and "market-allocation" agreement illegal per se under section 1 of the Sherman Act (C.L. 2); (2) that defendants thereby acquired monopoly power over the daily newspaper business in Tucson, with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L. 3, C.L. 4, C.L. 6); (3) that the acquisition of Star by Arden in 1965 was a part of and in furtherance of the conspiracy to monopolize (C.L. 5); (4) that

16. See orders referred to in preceding paragraph and footnote; see also Defendants' Offer of Proof with Respect to Alleged Violations of Section 1 of the Sherman Act, dated Apr. 28, 1966, A. 580; Defendants' Offer of Proof with Respect to Plaintiff's Discriminatory Administration of the Antitrust Laws, dated Apr. 28, 1966, A. 614; Defendants' Offer of Proof with Respect to the Joint Operating Agreement Between the Miami Herald and the Miami News, dated Feb. 13, 1967, A. 618; Defendants' Offer of Proof with Respect to the Effect on the Chattanooga Times and the Chattanooga News-Free Press of the Termination of the Joint Operating Agreement Between Them, dated Feb. 1967, A. 620; Defendants' Supplemental Offer of Proof with Respect to the Effect on the Chattanooga Times and the Chattanooga Free-Press of the Termination of the Joint Operating Agreement Between Them, dated Apr. 1967, A. 622; Oral Offer of Proof on Background of Pittsburgh Operating Agreement, Apr. 15, 1966, Tr. 1165-1169; Oral Offer of Proof on Background of Indianapolis Times Suspension, Apr. 15, 1966, Tr. 1171-1173.

the acquisition also violated section 7 of the Clayton Act (C.L. 7); and (5) that plaintiff was entitled to a decree directing the divestiture of Star and modification of the operating agreement (C.L. 8) (A. 100). Final judgment to this effect was entered (A. 102), and this appeal followed.

SUMMARY OF ARGUMENT

The Government here questions for the first time the antitrust legality of a newspaper operating agreement which has been in effect openly for over twenty-five years. This agreement and many others throughout the country have made possible the survival of independent and journalistically competitive metropolitan newspapers in more than a third of the 65 major cities in the United States in which two or more independent newspaper voices still remain.

In this test case, it was error for the District Court to have held by summary judgment that the operating agreement in Tucson was illegal per se in violation of section 1 of the Sherman Act.

It was error, first, because the Court reached this conclusion without considering any evidence as to the history of the agreement, the reason for its adoption or its effect upon the parties, the market, and the social welfare of the community. None of the facts peculiar to the newspaper business were weighed by the Court in determining that the agreement was so pernicious as to lack any redeeming virtue whatsoever.

Second, it was error because if the District Court had properly judged the agreement under the rule of reason, it would have held that the agreement provided, in substance and effect, for a merger of the commercial operations of Star and Citizen and that the merger, as appellants

contended, was exempt from antitrust criticism under the "failing company" doctrine. It was the District Court's mistaken view that the "failing company" doctrine would have been applicable only if Star had acquired Citizen outright and thereafter had published both newspapers as a single owner, thus eliminating an independent news and editorial source.

We contend here, as we contended below, that the operating agreement accomplished a merger of the commercial functions of Star and Citizen. Because Citizen in 1940 had for many years been a depleted company, because it was not salable to a publisher other than Star, and because the operating agreement was the only means by which the parties could have preserved for the Tucson community two separate news and editorial voices, the agreement and merger were exempt under the "failing company" doctrine.

The agreement was not only lawful in 1940 when Citizen was a failing company, it is lawful today because it is still vital to the preservation of competition between the two newspapers in the news and editorial fields. If the agreement is abrogated by the District Court's order, Citizen will become again a failing company and leave Star as the only newspaper in the Tucson community.

The Government's argument, which the District Court accepted, was that the organization of TNI and its operation of single advertising and circulation departments, which respectively sold advertising space and the newspapers themselves, was "price fixing." If this were true, every horizontal merger would be unlawful per se for the same reason. But it is not true; the sale and pricing of products and services by the single entity derived from a merger does not constitute "price fixing."

The Government also argued, and the District Court held, that the distribution by TNI of its revenues in accordance with an established formula to its newspaper owners was "profit pooling." This too was error—a merger otherwise lawful cannot become unlawful simply because the merged entity distributes its proceeds to its owners.

The Government charged, and the Court below agreed, that a provision in the operating agreement to the effect that the parties would not engage in another publishing business in Pima County, or in any other business in conflict with the agreement, constituted "market allocation." We contend that the provision in fact was reasonably limited in scope and area and was no more than an expression of the obligation of the parties to act in good faith toward their joint enterprise. As such it did not violate the Sherman Act.

The District Court's conclusion that defendants had monopolized the daily newspaper business in Tucson cannot stand. There is today no city in this country the size of Tucson which supports two metropolitan newspapers operating independently at both the commercial and journalistic levels. Monopolization proscribed by the Sherman Act does not occur in a market of this kind when one newspaper enters into an agreement with its failing competitor with the intent and effect of preserving a part of the failing enterprise which otherwise would have disappeared completely.

While appellants do not concede that the acquisition of Star violated section 7 of the Clayton Act, as the Government claims, they do not oppose divestiture if the operating agreement remains substantially intact. This is because the Smalls contemplated the prompt disposal of Star when it was acquired. They informed the Justice Department

of this intent prior to the acquisition and before the complaint was filed. If, however, the judgment below is affirmed with respect to the Sherman Act charges, then we submit that the order of divestiture should be modified to allow appellant Small to divest himself of either Citizen or Star, at his option. Otherwise, the order will be unduly harsh in view of the changes commanded in the operating agreement which would cause Citizen to fail.

ARGUMENT

I.

THE SUMMARY JUDGMENT OF PER SE VIOLATION OF THE SHERMAN ACT EXCLUDED EVIDENCE AND CONSIDERATION OF THE BUSINESS, ECONOMIC AND SOCIAL JUSTIFICATION OF THE AGREEMENT IN QUESTION. IN THIS CASE OF FIRST IMPRESSION, AND OF NATIONAL IMPORTANCE IN THE CONTEXT OF WIDESPREAD AND PROGRESSIVE SILENCING OF COMPETITIVE JOURNALISTIC VOICES UNDER THE PRESSURE OF ECONOMIC FORCES, THE SUMMARY JUDGMENT WAS ERROR.

Despite the Government's current assertions that the *Tucson operating agreement does not present* novel questions (M., p. 16), it correctly told the District Court:

> "* * * this is a different case from any case the Anti-Trust Division has yet brought in the newspaper field. That is a fact * * * this is the first time we have sued on this type agreement" (Tr., Feb. 13, 1967, p. 20; A. 633).

The District Court knew from the outset that this was a test case which will guide the policy of the Department of Justice towards newspapers throughout the country (Tr., Jan. 8, 1966, p. 30).

When this case was tried, no court in a Sherman Act case had yet examined the purpose of newspaper operating

agreements, or their actual effect upon competition. Thus, the District Court did not have the advantage of judicial precedents analyzing and passing upon similar facts. Nor to our knowledge has any court examined the various alternatives by which a failing newspaper might survive. But precisely such examination was necessary here (*White Motor Co. v. United States* (1963) 372 U.S. 253, 263); without it, the District Court had no basis to presume, as a matter of law, that appellants' operating agreement had a "pernicious effect on competition" and a "lack of any redeeming virtue" (cf. *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1, 5).

Although the Government conceded that the operating agreement "is not, in terms, an agreement to fix the advertising and circulation rates of the Star and the Citizen" (A. 104), the Court failed to give due recognition to the fact that the affidavits presented by defendants showing business and social justification for the agreement (supra, p. 21-22) raised genuine issues of material facts (Rule 56, Federal Rules of Civil Procedure).

The Court granted summary judgment after considering certain paragraphs of the operating agreement in isolation and applying to them the familiar per se labels "price fixing," "profit pooling" and "market allocation." The Court, in effect, assumed that the remainder of the agreement was superfluous and that the only significant paragraphs were those challenged by the motion. Having taken this approach, the court accepted the Government's argument that any defense appellants advanced was merely an attempt to justify a per se violation of the Sherman Act. This led the Court to exclude evidence and reject offers of proof that operating agreements in Tucson and elsewhere were an industry-wide response to the problem of the failing newspaper (cf.

Times-Picayune v. United States (1953) 345 U.S. 594, 623-624):

The Tucson operating agreement is a representative model of the response made by an increasing number of newspapers to economic conditions in the newspaper industry, which have been progressively eliminating the competing daily newspaper from the American scene, and have led, in turn, to an increasing concentration of newspaper ownership and control (D.X. 121, A. 484; Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717). From 1940 to 1960, cities served by a single daily increased from 76.5 per cent of all cities with daily newspapers to 83.6 per cent (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201). In 1965, in more than half the states no city had two separately owned dailies competing at the commercial and journalistic levels (D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, Tr. 715, 717; D.X. 124, A. 486, Tr. 2059, 2060).

Meanwhile concentration of control into large chains of newspapers has been rapidly increasing. During the period 1940-1960, the numbers of daily newspapers controlled by newspaper chains increased from 319 to 560, or approximately 32 per cent of all dailies, with 45 per cent of the total daily circulation in the United States (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 123, Tr. 2057, 2058; D.X. 138, Tr. 2042, 2043). Since 1960, through May, 1968, newspaper chains acquired an additional 268 daily newspapers, for a grand total of 828—58 per cent of the entire daily circulation of all newspapers in the United States, and 63 per cent of the entire Sunday circulation (Editor & Publisher, June 1, 1968, p. 17).[17]

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17. The statistics on chain-owned newspapers do not reflect the concentrated ownership among the chains themselves. In 1967, for example, Thomson Newspapers, a Canadian-based chain which con-

In the last four years alone, from 1964 through January 1, 1968, competing editorial voices have been stilled, by suspension or merger, in Houston, Texas (*Press* (1964)); Phoenix (*Arizona Journal* (1964), *Arizona News* (1965)); Atlanta (*Times* 1965)); Indianapolis (*Times* (1965)); Minneapolis (*American* (1965)); Haverhill, Mass. (*Journal* (1965)); New York City (*Herald Tribune, Journal American, World-Telegram and Sun* (1966), *World Journal Tribune* (1967)); Lima, Ohio (*Star* (1966)); and Kokomo, Indiana (*Times* (1967)), among other cities (American Newspaper Publishers Association General Bulletins, No. 5 (Feb. 3, 1965), No. 6 (Feb. 9, 1966), No. 7 (Feb. 8, 1967), and No. 10 (Feb. 21, 1968)).

An operating agreement, such as the one in Tucson, is frequently the only alternative to outright suspension of a newspaper, or complete absorption by a stronger rival (D.X. 183, pp. 40-42, Tr. 2459, D.X. 191, pp. 39-42, A. 550, Tr. 2463; D.X. 192, p. 29, A. 560, Tr. 2463). Apart from Tucson, operating agreement newspapers in 15 cities have identified themselves by name before this Court and have stated that without the savings derived from joining their advertising, circulation and business departments, as well

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trols 56 newspapers in Britain, 41 in Canada, as well as newspapers in Thailand, the West Indies, and elsewhere throughout the world, acquired the entire Brush-Moore chain (which, in 1964, had sought to purchase Star) for some $72 million (Fortune, Feb., 1967, p. 176; Wall Street Journal, Dec. 11, 1967, p. 28). This acquisition helped make Thomson Newspapers the fifteenth largest chain in the United States, with 36 dailies and 13 Sunday papers for a combined 7-day circulation of 4,546,290 (Editor & Publisher, June 1, 1968, p. 17). Since June, Thomson has acquired an additional daily, the Portsmouth, N. H., *Herald* (Editor & Publisher, Oct. 19, 1968, p. 22). Like nearly all the other 36 American newspapers owned by the Thomson chain, the *Herald* is the sole daily published in its community (Editor & Publisher, 1968 Yearbook, p. 162).

as printing departments, "virtually every city in which an operating arrangement exists inevitably will become either a one newspaper city or a city in which newspapers are published under single ownership" (Memorandum of Amici Curiae in Support of Jurisdictional Statement, p. 10).[18]

A failing newspaper is not easily saved. Once it is launched on the downward circulation-advertising-quality spiral, its advertisers—usually starting on the national level—soon begin to swing their most remunerative advertising schedules to the stronger paper (D.X. 191, pp. 37-39, A. 548, Tr. 2463). As national advertisers swing to the stronger newspaper, local merchants begin to follow, with the result that soon the weaker newspaper finds itself short of operating revenues (D.X. 191, pp. 38-39, A. 549, Tr. 2463). Financial weakness, in turn, generates pressures by financial institutions, important advertisers, and power groups, all of which tend to erode the paper's independence and eventually its acceptability to the public (Tr. 696; Tr. 797, A. 204; Tr. 2435, A. 375; Manno Aff., p. 7, A. 118).

Once a metropolitan daily has failed, it is seldom, if ever, replaced. The initial cost of acquiring expensive machinery and equipment, establishing distribution routes, and obtain-

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18. Evidence admitted on the monopolization issues demonstrated that in Albuquerque, Honolulu, El Paso and San Francisco, one of the newspapers was failing at the time it entered into an agreement similar to the Tucson plan (D.X. 183, p. 24, A. 524, Tr. 2459; Tr. 827, A. 221; Tr. 879, 886-887, A. 247, 253; D.X. 191, pp. 18-19, A. 544, Tr. 2463). On the Government's objection, the Court excluded testimony which would have shown that newspapers in Birmingham, Knoxville, Columbus, Pittsburgh, and Miami were likewise failing at the time they entered operating agreements with their stronger competitors (Tr. 1160-1165, A. 261).

Also, the Court sustained the Government's objection to testimony that the Indianapolis *Times* suspended completely after it attempted, but failed, to enter into an operating agreement with the stronger Indianapolis *Star* (Tr. 1171-1172, A. 266).

ing advertising all militate against the venture.[19] Further, even where an existing newspaper possesses sufficient equipment, staff and financing to enter a new market, the slim chance of success against an already established newspaper, and the high potential cost of competition, make entry unlikely. Such was the case in New York City, where the prestigious *New York Times* and the *New York Daily News* decided against publishing an afternoon edition in competition with the *New York Post*, following the 1967 demise of the *World Journal Tribune*, the only other city-wide afternoon daily.[20]

These facts illustrate, in its broadest aspects, the problem before the District Court. The Government's motion for summary judgment confronted the Court below with two alternatives: First, the Court could have denied the Government's motion and interpreted and applied the Sherman Act in the light of its impact upon the social and economic realities of the day—in other words, applied a rule of reason. Second, the Court could have granted the motion without analysis of the real effect of the unique agreement in question upon competition. The Court chose the latter course.

In so doing, we respectfully submit, it violated fundamental legal principles and produced a harsh and detri-

19. In Phoenix, for example, where there are two existing newspapers under a common ownership, three new entries have failed in the past five years (*Arizona Journal*—failed twice, 1963, 1964; *Arizona News*—failed 1965 (American Newspaper Publishers Association General Bulletins No. 5 (Jan. 29, 1964), No. 5 (Feb. 3, 1965), and No. 6 (Feb. 9, 1966)). So have recent new entries in Minneapolis (*Herald*—failed 1962), Atlanta (*Times*—failed 1965), and New York City (*World Journal Tribune*—failed 1967) (American Newspaper Publishers Association General Bulletins No. 6 (Jan. 30, 1963), No. 6 (Feb. 9, 1966), and No. 10 (Feb. 21, 1968)).

20. *The New York Times*, Tuesday, Oct. 3, 1967, p. 43; *The New York Times*, Friday, Jan. 19, 1968, p. 44.

mental result contrary to the spirit and intent of the Sherman Act. The basis of the per se rule can only be that the agreement in question could not be justified by any purpose, or social or economic consequence—that it was inherently so pernicious and lacking in any redeeming virtue that as a matter of law it stands condemned regardless of all evidence and contentions as to its reasonableness. In the absence of established judicial precedent analyzing the question upon full consideration of economic facts and social purposes, the reasoning of the Court below is inevitably circular: the per se rule operates to exclude consideration of factors of reasonable justification; the absence of reasonable justification permits application of the per se rule.

By thus assuming the ultimate fact in issue the Court took a route pointing to the destruction of two viable, separate and competitive newspaper voices in Tucson, without yielding any benefit to the community.

No speculation as to potential new competition in the future[21] can substitute for assured and actual competition in the present. The damage to the press following the progressive snuffing out of one competitive newspaper after another is a contradiction of the spirit and purpose of the First Amendment. As Judge Learned Hand has said, the press "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible.

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21. In the Court below, and in its motion to dismiss or affirm in this Court, the Government urged the paradoxical contention that although the operating agreement with its effect of preserving the two independent and competing newspaper voices in Tucson was bad, a complete merger of the two newspapers into one would be unassailable, on the ground that this would leave the door open for a new competitive newspaper to come in and seek to establish itself (A. 652, M. 22). The anomaly of destroying present, actual competition in favor of the speculative possibility of competition in the future hardly needs an answer.

That interest * * * presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all" (*United States v. Associated Press* (S.D.N.Y. 1943) 52 F.Supp. 362, 372, affirmed (1945) 326 U.S. 1).

Appellants do not contend that the press should be exempt from the antitrust laws. Nor do they deny that the operating agreement ended the specious (one party bankrupt) competition between Star and Citizen on the commercial level, or that the parties to the agreement knew it would necessarily have such effect. They contend, on the other hand, that the operating agreement was justified by the failing company doctrine in 1940, and is sustained by the rule of reason today, as the only reasonable means of preserving news and editorial competition in Tucson.[22]

II.

THE OPERATING AGREEMENT WAS IN 1940 AND IS NOW AMPLY SUPPORTED BY THE RULE OF REASON

When the rule of reason is applied to the 1940 transaction, it becomes readily apparent that the transaction was not a violation of section 1. The transaction was, in substance and effect, a merger which combined all of the commercial operations of the two newspapers as well as the assets used to sustain them. The validity of mergers is judged by the rule of reason. At the time of the merger here in question, Citizen was a failing company, a fact which under the rule of reason justified the operating agreement as the only means by which the two newspapers could have continued as separate and independent sources of news and opinion.

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22. The Court rejected testimony on the importance to Tucson of maintaining two independent newspaper voices (A. 580).

In these times of increasing costs and expanding competition from other media, the operating agreement is still necessary to preserve in Tucson newspapers competing in the news and editorial areas. The evidence shows that if the provisions for combined advertising, circulation and business departments and for the distribution of revenues to the newspapers by established formula are abrogated, Citizen will promptly decline and eventually fail.

A. The Transaction Was, in Substance and Effect, a Merger Combining Into One Company All of the Commercial Operations of the Two Newspapers.

It is manifest that the 1940 operating agreement in substance and effect accomplished a merger.[23] This being so, the legality of the transaction must be judged by the rule of reason (*United States v. First Nat. Bank* (1964) 376 U.S. 665, 668-670). As in all Sherman Act questions, the inquiry as regards legality is directed to substance, not form (*U.S. v. Masonite Corp.* (1942) 316 U.S. 265, 278, 280).

Examination of the facts leaves no doubt that the substance of the transaction in question here, and the economic effect both as to the parties themselves and as to the market in which they operated, were for all practical purposes the same as though a de jure merger had been effectuated.

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23. The legal question presented here is not affected by whether the transaction is technically a merger, a joint venture, a consolidation, or a combination of one or more of these concepts (cf. *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 332, n. 7). Because the transaction involved a purchase by each newspaper of an interest in the assets of the other and a combining of the resources of both companies we call the transaction a "merger." See Kaysen and Turner, *Antitrust Policy* (Harvard University Press, Cambridge, 1965), p. 136: "joint purchase of existing assets • • • analytically differs little from the merger question." See also Zimmerman, *Adventures in Jointness*, 37 Antitrust Law Journal (1968) 125, 126: "the joint venture which involves a total and permanent combination of all or part of one company's resources with another is simply a merger."

By the operating agreement, the entire commercial departments and functions of the two papers passed into new hands, and under the sole management and control of the new corporation, TNI (F. 5, 18, 19, 27, 28, 29, 30, 32, 33). Each newspaper terminated all of its own commercial operations, and retained only the news and editorial departments (F. 18, 19, 27, 28, 30, 31, 32, 33). Each transferred title to all its machinery and equipment (except for the small amount retained for use in its news and editorial departments) into the joint ownership of both, and then consolidated these assets under the sole management and operation of the newly formed, mutually owned, third corporation (TNI) (F. 5, 27, 28, 29).[24] Each newspaper transferred to TNI, as working capital, all of its accounts receivable (F. 27), and each delivered to TNI all of its business records and production supplies (F. 32; G.X. 2, pars. 1, 6; A. 30, Stip.; D.X. 185, A. 510, Tr. 1883, 1887; D.X. 186, A. 511, Tr. 2007, 2009). Each transferred the staffs and operations of its commercial departments (circulation, advertising, business) to TNI (F. 5, 18, 19, 30, 32, 33, 34; G.X. 2, pars. 1, 8(a), 10, 12, A. 30, Stip.) and surrendered to it the right and discretion to employ and discharge operating personnel (G.X. 2, par. 12, A. 30, Stip.).

The operating agreement directed TNI to establish a single, unified annual operating budget for printing, selling and distributing the two newspapers (G.X. 2, par. 10, A. 30, Stip.). It further provided that all machinery and equipment acquired by TNI after 1940 would be held in

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24. Because of a revenue ruling, the parties retained joint title to the machinery and equipment rather than transferring title to TNI, in order to avoid a double income tax, once on TNI's circulation and advertising revenues, and a second time on the receipt of the net revenues by Star and Citizen (D.X. 181, Stip.; D.X. 120, A. 480, Tr. 883, 884).

joint title by the two newspapers, and that the costs of repair and replacements would be paid by the operating company, as a part of its cost of doing business (G.X. 2, par. 4, A. 30, Stip.).

The owners of Star and Citizen clearly expressed the intention to merge the commercial operations of the two newspapers. Apart from testimony at the trial that such was their intention (Tr. 774-776, A. 186; Tr. 795, A. 202), front-page editorials appearing in *Star* and *Citizen* at the time the operating agreement became effective stated:

> "Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. * * *
>
> " * * * By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. * * *" (D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.).

Thus, the entire commercial business—production, advertising, circulation, accounting, billing and collection, together with full control of purchase, sale, and operation of assets and of employment and remuneration of personnel—was given over by the two newspapers to the new corporation, and the newspapers divorced themselves from those operations as completely as though so much of their businesses had gone through the legal forms of de jure merger or consolidation. So far as the effect on competition and

the market is concerned (and this is the Sherman Act issue), there was no difference whatever from a de jure merger of these parts of the businesses.

Under the operating agreement, the complete merger of the commercial departments and business has continued (F. 5, 19, 30, 32, 33, 34). Since 1940, TNI has conducted all production, advertising, circulation and business activities incident to the printing, sale and distribution of the two newspapers (F. 19, 30, 32, 33, 34). Towards this end, it has consolidated all production operations; it uses a single composing room, dummy desk, stereotype department, and printing press facility for both newspapers (F. 5, 33). Likewise, it has but a single advertising and circulation department (F. 5, 19, 34; D.X. 218, A. 513, Tr. 1707, 1708). Since 1940, a single business department has been responsible for plant maintenance, purchases of supplies, TNI payroll and personnel records, revenue and expense records, advertising lineage records, credit records, labor negotiations, and all the other details that are common to the commercial end of newspaper publication (F. 32, 62). The consolidated production, commercial and business operations of TNI are conducted at a single plant originally built for Star (Tr. 1629-1630; Tr. 1743-1744; D.X. 50a, A. 475, Stip.).

TNI is controlled by a board of directors representing both Star and Citizen interests (F. 29; G.X. 2, par. 2, A. 30, Stip.), and the TNI management team as a unit is different in organization and personnel from the management groups of either Star or Citizen (G.X. 2, par. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 218, A. 513, Tr. 1707, 1708; Tr. 2417-2418, A. 364).

Thus in 1940, there was a mutual acquisition of assets owned by two separate firms, a termination of their former commercial businesses and a transfer of these businesses

entirely to the new entity, TNI, which consolidated and managed the mutually acquired assets, hired and paid its personnel, priced and sold its products and services and distributed its net revenues to its stockholders. In the economic and practical sense—the sense which is relevant to the operation of the antitrust laws—the transaction was, and had all the effects of, a merger.

B. At the Time of the Merger, Citizen Was a Failing Company, a Fact Which Justified the Agreement and Merger as Lawful Under the Sherman Act.

The District Court erred in refusing to apply the "failing company" doctrine to the operating agreement and merger in this case. Had the Court properly done so, it would have held that the agreement and merger did not violate the Sherman Act.

By 1940 the financial condition of Citizen had become so desperate that the Company came fairly within the "failing company" doctrine. Simply stated, that doctrine recognizes that a merger which rescues a failing company is lawful because it does not lessen competition. The doctrine was defined by this Court in *Internat. Shoe Co. v. Comm'n* (1930) 280 U.S. 291, 302-303:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or re-

strain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this Court suggested in *United States v. U. S. Steel Corp.* (1920) 251 U.S. 417, 446-447, would 'seem a distempered view of purchase and result.' See also *American Press Ass'n v. United States* 7 Cir. 1917 245 Fed. 91, 93-94."

Congress approved the "failing company" doctrine when it enacted the 1950 amendments to section 7 of the Clayton Act. The Senate Report on that amendment stated as its interpretation of *Internat. Shoe Co. v. Comm'n,* supra, that to come within the "failing company" exception "a company does not have to be actually in a state of bankruptcy * * *; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue" (S.Rep.No. 1775, 81st Cong., 2d Sess., p. 7 (1950); see also H.Rep.No. 1191, 81st Cong., p. 6 (1950)).

From 1932 to 1940, Citizen operated at a substantial loss and for many years it had been unable to pay a dividend (F. 12, 15). It could not match Star in circulation, because of Star's publication of a Sunday edition (D.X. 27g, Stip.; Tr. 771, A. 184),[25] nor could it attract advertising from Star, even when it cut its rates (F. 13, 178; Tr. 1543, A. 294). Continuous infusions of working capital by its stockholders failed to reverse the downward trend (F. 12, 14, 15).

Small, Sr., principal stockholder, was unsuccessful in his attempts between 1937 and 1939 to attract additional financ-

25. The 1940 circulation figures for Star and Citizen set forth in Finding 116 do not show comparative circulation before the merger. In 1939 Citizen's average six-day circulation was 10,474 copies, as compared to Star's average six-day circulation of 12,122 copies, and in 1938 it was 9,442 for Citizen and 11,795 for Star. In addition, Star circulated more than 12,000 Sunday editions each week (D.X. 27g, Stip.).

ing from outside sources (F. 14).[26] The evidence was undisputed that because of the many years Citizen had operated at a deficit it was impossible in 1940 to sell Citizen to a publisher outside Tucson who had not made prior arrangements to sell the newspaper to Star or enter into an operating agreement with Star (Tr. 836-840, A. 226; D.X. 183, pp. 41-42, Tr. 2459, 2460; D.X. 191, pp. 40-41, A. 551, Tr. 2463).

By March, 1940, Citizen owed debts of more than $109,000, of which approximately $79,000 was owed to its stockholders (F. 15). Its liabilities exceeded its assets and it was kept alive only by the willingness and ability of its stockholders to advance their personal funds (F. 12, 14; supra pp. 9-10).

Star, by comparison, was in good financial condition. From 1935 to 1939, it controlled 50 per cent more of the newspaper advertising market in Tucson than did Citizen (F. 13). Star's profits during this period averaged $20,984 per year, as compared with Citizen's average annual losses of $23,550 (D.X. 161, A. 499, Tr. 1874, 1878). The owners of Star were aware of Citizen's financial straits and knew it would only be a matter of time before Citizen must "give up the ghost" (Tr. 764, 771, A. 178, 184).

In these circumstances, Small, Sr., moved to Tucson in 1939 and became the president and treasurer of Citizen (F. 14; D.X. 10q, Stip.). He worked without a salary (F. 15),

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26. Small, Sr., father of appellant William A. Small, Jr., solicited additional financing for Citizen from persons interested in newspapers and experienced in the communications industry (Tr. 798-799, A. 204). None were willing to invest in Citizen, and not surprisingly since the newspaper business throughout Arizona, and the rest of the country at the time, was a decidedly poor investment risk (D.X. 128, Tr. 2069, 2070; Tr. 769-770, A. 182; supra, p. 5; see also Appellants' Statement Opposing Motion to Affirm, p. 6, fn.). "The period 1937 through 1943 constituted the most dismal era in 20th Century newspaper history; more than half of the net decrease of daily newspapers since 1909 occurred during those seven years" (Ray, Royal H., *Economic Forces as Factors in Daily Newspaper Concentration,* Journalism Quarterly (Winter 1952) p. 34).

but the situation continued to deteriorate. As of December 31, 1939, Citizen had current liabilities of over $47,000, as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand (supra, p. 9). Its liabilities exceeded its assets, exclusive of goodwill, by some $53,480 (supra, p. 9). In March, 1940, when the operating agreement was executed, liabilities exceeded assets by $81,034. When the agreement became effective three months later, Citizen had overdrawn its bank account by $1,232 and had $75 cash on hand. For the six months ending June 30, 1940, its net operating losses totaled $13,131, or $2,188 per month. Its assets, other than goodwill, had shrunk from $80,409 on December 31, 1939, to $54,393 three months later, and to $47,425 by June 30, 1940, (supra, p. 10).

Citizen was faced with four alternatives:

1. Suspension of operations and sale of assets on the second-hand market;
2. Merger with Star;
3. Sale of Citizen to the owners of Star, or to a publisher who had made a prior arrangement to merge with Star; or
4. Execution of an operating agreement between Citizen and Star (Tr. 768, 777, A. 181, 189; Tr. 840, A. 229; D.X. 183, pp. 40-42, Tr. 2459, 2460; D.X. 191, pp. 39-42, A. 550, Tr. 2463; D.X. 192, p. 29, A. 560, Tr. 2463, 2464).

The first three alternatives would have terminated independent editorial and news competition in Tucson. The fourth—the one ultimately adopted—was the only one which could assure the continuation of that competition.

At the time, Citizen was not only faced with a "grave probability of a business failure," it was in fact a business failure. As such, its merger with Star did not offend the Sherman Act but instead saved a separate source of news

for the community. In these circumstances, the merger was not prejudicial to the public, nor did it restrain competition within the meaning of the Sherman Act (see *Internat. Shoe Co. v. Comm'n.* (1930) 280 U.S. 291, 301-303; *United States v. U. S. Steel Corp.* (1920) 251 U.S. 417, 446-447; *American Press Ass'n. v. United States* (7 Cir. 1917) 245 Fed. 91, 93-94; *White Motor Co. v. United States* (1963) 372 U.S. 253, 263-264).

During the period 1936-1940, Star's owners had rejected suggestions of an outright merger with Citizen (Tr. 765-768, 776-777, A. 179, 188), which as above stated would have ended, rather than preserved, journalistic competition. Off and on from 1936, however, they had discussed with Citizen the possibility of an operating agreement similar to those between the newspapers in Albuquerque and El Paso (F. 16, F. 21, Tr. 768, A. 181; Tr. 794-795, A. 201). The owners of Star and Citizen were convinced that Tucson was not large enough to support two completely independent and commercially competing newspapers (F. 22, D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 764, 771, A. 178, 184).

The willingness of Star to enter into an operating agreement with Citizen rather than accepting an outright merger or the remains of a failed company was explained by the testimony of Mr. Mathews, the publisher and one of the owners of Star.[27]

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27. "* * * I didn't want to see a monopoly in Tucson; I didn't want to be connected with a monopoly in Tucson or anywhere else. But I saw that this plan of unification of the business side of the paper would preserve two independent voices in Tucson. To me that is the important consideration and I say that if this hadn't worked out eventually I would have been offered the Citizen, they had to offer it to me eventually, and then I would have been a monopolist here in Tucson with only my voice being heard and no other voice being heard.

* * *

"That was a situation I wanted to avoid" (Tr. 777, A. 189).

Prior to adopting the operating agreement, the parties considered cost studies and calculations of savings that might be obtained for the two newspapers (Tr. 650-651, A. 148; Tr. 772, A. 184). It was clear that joint printing and distribution alone would not have cured Citizen's operating deficit (F. 34; D.X. 161, A. 499, Tr. 1874, 1878; D.X. 166, A. 503, Tr. 1898, 1913; D.X. 176, A. 508, Tr. 1914, 1920; D.X. 183, pp. 43-45, Tr. 2459, 2460; D.X. 191, pp. 45-47, A. 553, Tr. 2463; Tr. 753-754, A. 172; Tr. 832, A. 224; Tr. 896-897; Tr. 1177, 1196-1197, A. 270, 274; supra, pp. 14-15). Hence, it was decided that, in order to achieve savings sufficient to preserve Citizen, the operating agreement must provide, among other things, for a joint advertising and a joint circulation department (G.X. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 650-651, A. 148). In practice, the decision proved to be correct (F. 34; F. 46). The evidence shows that during the three years following the merger in 1940, consolidation of the printing and distribution facilities alone yielded average annual savings for Citizen of less than $9,000 per year (D.X. 176, A. 508, Tr. 1914, 1920)—far from enough to offset Citizen's prior average annual operating losses of over $23,550 per year for each of the five years preceding 1940 (D.X. 161, A. 499, Tr. 1874, 1878).

In short, as the parties contemplated and as events proved, the operating agreement was the only practical means by which the two independent and competitive news and editorial voices in Tucson could be kept alive.

Clearly, the validity of the merger of the commercial businesses of Star and Citizen should have been judged by the District Court under the "failing company" doctrine. The District Court refused to apply this doctrine for two reasons: First, it was the Court's view that the "failing

company" doctrine would have been applicable only if Star had acquired Citizen outright and had published both papers as a single owner. The following colloquy occurred between Court and counsel:

"THE COURT: * * * They both go on retaining their identities as corporations; they treat TNI as a viaduct, means by which each operates, each continues to actually put out the Arizona Daily Star and Tucson Daily Citizen. And that is the trouble I have with the failing company and the merger doctrine, my conception of it doesn't fit.

"MR. MACLAURY: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"THE COURT: I would say that . . .

"MR. MACLAURY: Assuming all the other factors.

"THE COURT: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition". (Tr. Feb. 15, 1967, p. 412, A. 647).

Thus the Court deemed that the operating agreement would not have been unlawful under the Sherman Act if the two newspapers had eliminated all news and editorial rivalry. It interpreted the Sherman Act as requiring elimination of independent and divergent sources of news and opinion—values which are closely akin to, if indeed not the same as, the interests protected by the First Amendment (see *Times-Picayune v. United States* (1953) 345 U.S. 594, 602-603). But to insist upon merger of all or nothing when a partial merger would—and in this case did—save areas of competition which would disappear under a total merger, scarcely comports with the objects and intent of the antitrust laws.

The second reason why the District Court refused to apply the "failing company" doctrine may be inferred from its Finding 17. There, the Court found that at the time the operating agreement was entered into and when it became effective "Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability" that this would happen if it did not enter into the operating agreement. The only evidence which has any connection with that finding is mentioned in Finding 14, where the Court refers to testimony by Small, Sr., that in 1939 when he came to Tucson he was prepared to finance the losses of Citizen Publishing "for some little time" from other resources. It was never established what those other resources were, or how long they would last. It is clear, however, that in March, 1940, Small, Sr., and his family no longer had the desire to continue carrying Citizen's deficit. Small was well aware of the current trend towards newspaper failures (Tr. 795-797, A. 202) and he was satisfied that Tucson "can no longer provide a field for two separately produced newspapers" (D.X. 50a, A. 475, Stip.; G.X. 2, A. 30, Stip.; Tr. 795, 797, A. 202, 204). In any event, the state of mind of Small, Sr., and his family is not material. The willingness of one, or a group, of a company's stockholders to spend their last dollar to support a losing operation is, by its nature, subjective and transitory and does not support, as against objective facts, a finding that a company is not on the verge of going out of business (see *Internat. Shoe Co. v. Comm'n* (1930) 280 U.S. 291, 299-303).

Further, the conclusion of the District Court expressed in Finding 17 contradicts its prior findings of fact that from 1932 to 1940, Citizen Publishing operated at a substantial loss (F. 12), that from 1937 to 1940, Citizen Publishing lost money (F. 14), that between 1937 and 1939, Small, Sr., made unsuccessful efforts to attract additional financing (F. 14), that for many years prior to 1940, Citizen

Publishing had been unable to pay a dividend (F. 15), that prior to 1940, Small, Sr., received no salary (F. 15), and that by March, 1940, Citizen Publishing owed debts of more than $109,000 (F. 15). These contradictions between facts and conclusion demonstrate that a mistake has been committed by the District Court (see *United States v. Gypsum Co.* (1948) 333 U.S. 364, 394-395). Clearly the conclusion in Finding 17 is erroneous.

C. None of the Government's Per Se Labels Fits the Agreement in Question, Nor Militates Against Its Validity.

1. The "price-fixing" charge.

The Government contended that the establishment of a single advertising department and a single circulation department constituted price fixing (Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 13-18, A. 104). The Court accepted the Government's views and equated the operation of the joint advertising and circulation departments with "price fixing" (F. 190-191; C.L. 2). But an agreement among two or more business firms, competing in the marketing of their products or services, to fix the prices therefor, has no comparability with a transaction whereby two firms get out of the business of marketing their products or services and turn over their entire commercial operations to a single entity (as in a merger or consolidation, and as here), with full power to fix its own prices in obedience to the laws of supply and demand and to the competition of alternative products and services. If the taking over of two businesses by a single entity constituted "price fixing," every horizontal merger would be illegal per se.

It is well recognized that a price-fixing combination between two competing firms will have such a pernicious effect and lack of redeeming benefit as to be per se illegal. But it is also well recognized that a merger may have overbalancing economic and social benefits in preserving the

life of an ailing business. It is on the basis of this fundamental difference that the courts have always examined the legality of mergers under the rule of reason, as distinguished from applying the per se rule to price agreements between viable competitors (*United States v. First Nat. Bank* (1964) 376 U.S. 665, 668-670; *White Motor Co. v. United States* (1963) 372 U.S. 253, 263-264).

The entity which results from every merger makes price decisions with respect to its products or services. But this does not make those decisions per se illegal.

2. The "profit-pooling" charge.

The same considerations apply to the Government's charge of "profit pooling." Any merger or joint venture entails the distribution of its proceeds to its owners. A merger otherwise lawful cannot become per se unlawful because this normal operation takes place.

The parties agreed that the new operating plan would be unworkable without distribution of revenues to the two newspapers in accordance with an established formula (Tr. 664, A. 158; Tr. 782, A. 192; Tr. 800, A. 206). Had the plan provided, as the Government suggests the Sherman Act required (M. 15), that TNI net revenues be distributed in accordance with the advertising lineage and circulation of each newspaper, joint advertising and circulation departments in TNI would have been impossible (Tr. 664, A. 158; Tr. 710-712, 755-756; Tr. 782, A. 192; Tr. 800, A. 206; Tr. 830-831, 841; Tr. 1178-1179, A. 270; Tr. 2442-2443, A. 380; D.X. 183, pp. 45-49, A. 529; Tr. 2459, 2460; D.X. 191, p. 46, A. 554; Tr. 2463; D.X. 192, pp. 41-42, 47-48; Tr. 2463, 2464). This is because a joint advertising and circulation department in TNI, through control of advertising and circulation sales, would have the power of life or death over either newspaper as it might choose (Tr. 2443, A. 381; D.X. 183, pp. 45-49, A. 529; Tr. 2459,

2460; D.X. 191, pp. 46-49, Tr. 2463; D.X. 192, pp. 41-42; Tr. 2463-2464). On the other hand, as the undisputed evidence shows, joint advertising and circulation departments were indispensable in providing the necessary savings (supra, pp. 14-15, 46). Further, an established formula assured that Citizen would receive sufficient funds to finance its separate news and editorial operations and produce a high quality newspaper (Tr. 773, A. 185; Tr. 1169-1170, A. 264). Because the formula was fixed by agreement, Star, which nominated three of the five TNI directors, could not force upon Citizen a reduction of its share of TNI revenues.

Distribution of revenues by established formula was not then, nor is it now, unusual. Operating agreements in effect outside Tucson contain similar provisions for distributing revenues to the participating newspapers (D.X. 183, pp. 45-49, A. 529, Tr. 2459, 2460; D.X. 191, pp. 46-49, Tr. 2463; D.X. 192, pp. 41-42, 47-48, Tr. 2463, 2464; Tr. 1169-1170, A. 264).

The Government charged that the distribution of revenues by TNI to Star and Citizen in accordance with an established formula was illegal "profit pooling." A merger or joint venture does not become unlawful simply because its revenues are distributed among the owners. We do not have here a case such as *United States v. Paramount Pictures* (1948) 334 U.S. 131, 149, relied upon by the Government, in which separate and financially sound motion picture companies agreed to pool the profits from the operation of their separate theatres. Nor is the distribution of profits by TNI to its owners comparable in any way to the organization of a holding company to receive and pool the earnings of two viable competing railroads, such as in *Northern Securities Co. v. United States* (1904) 193 U.S. 197, 328, a case also relied upon by the Government.

3. The "market-allocation" charge.

The operating agreement contained a provision that Star and Citizen, as well as their officers, executives and stockholders, would not engage in any other publishing business in Pima County, or in any other business in conflict with the agreement (F. 19). This was found by the Court to have been an agreement to "allocate markets" (C.L. 2). Actually, it was an agreement ancillary to the main lawful transaction and was no more than an expression of the obligation imposed by law that participants in a common enterprise must act in good faith, and may not cripple or injure the enterprise (*Tovrea Land and Cattle Company v. Linsenmeyer* (1966) 100 Ariz. 107, 412 P.2d 47, 57; *Red Top Cab Co. v. Hanchett* (N.D.Cal. 1931) 48 F.2d 236, 238). Such agreements, reasonably limited in scope and area, do not conflict with the Sherman Act (*Cincinnati Packet Company v. Bay* (1906) 200 U.S. 179, 185; *United States v. Addyston Pipe & Steel Co.* (6 Cir. 1898) 85 Fed. 271, 281-282, affirmed (1899) 175 U.S. 211).

D. The Operating Agreement Is Still Necessary to Preserve the Competition of the Two Newspapers in the News and Editorial Fields. The Evidence Demonstrates That If the Provisions of the Agreement Condemned Per Se by the Court Below Were To Be Eliminated, Citizen Would Quickly Revert to Its Downward Course to Failure.

The operating agreement has now been in existence for 28 years. During that time it has provided Tucson with two high quality metropolitan newspapers (F. 46, F. 64). Each is a more sophisticated and larger newspaper than it was in 1940, and each costs more to produce (D.X. 9a, Stip.; D.X. 9x, A. 463, Stip.; D.X. 150b, Stip.; Tr. 2180, 2181; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; G.X. 40, 41, Stip.).[28]

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28. Citizen, for example, averaged 14.6 pages per issue in 1940 and 45 pages per issue in 1964 (D.X. 150b, Stip., Tr. 2180, 2181). News content increased from 9.6 pages to 16.6 pages (ibid.).

News and editorial salaries alone totaled $856,813 for Star and Citizen in 1964, up from $28,030 and $16,977, respectively, in 1939 (D.X. 2e, 7e, Stip.; D.X. 2dd, A. 459, Stip; D.X. 7dd, A. 462, Stip.). Similarly, combined business, production, distribution and circulation expenses for TNI jumped from $343,469 in fiscal year 1940-1941 to $5,315,937 in 1964 (D.X. 9a, Stip.; D.X. 9x, A. 463, Stip.).

The Government emphasizes the fact that during this same period revenues have increased, and that whereas prior to 1940 Citizen was failing, it is now operating at a profit (M. 6). The implication is that if the merger were dissolved, Citizen could still continue at a profit. But the District Court was not so sure. It found that if the operating agreement were limited to joint use of mechanical equipment, it would be "impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be • • •" (F. 192). Pro forma statements of the operations of Star and Citizen showed that if the operating agreement had been limited to joint presses and distribution facilities during the three years prior to trial (1962, 1963 and 1964), Citizen would have sustained an average operating loss of $77,083 per year (D.X. 163, A. 501, Tr. 1820, 1863, A. 311, 319). Star, by comparison, would have realized an average before-tax net profit of $436,113 per year (ibid.). This sizable difference is due, among other things, to Star's ownership of the Sunday newspaper, which it has retained under the operating agreement (Tr. 1867-1869; G.X. 2, par. 3, A. 30, Stip.).

The Court acknowledged that the organization of separate advertising and circulation departments for each newspaper would increase their operating expenses (F. 195, F. 196) and, in turn, the costs to advertisers (F. 194). It

also found that additional circulation trucks would be required, as well as substantially more distribution personnel (F. 196). Additional, separate business departments would be needed (Tr. 1720). At the production level, separate composing rooms and dummy desks would be required to protect each newspaper against premature disclosure to the other of the contents of its customers' advertisements (supra, p. 15).

On the cost side, Citizen could not reduce the expenses of its advertising department staff if it would compete with Star (Tr. 2429-2431, A. 371).[29] The same was true of the circulation department (ibid.). To bring expenses into line with revenues, the major reduction in cost would be made in the news and editorial departments (Tr. 2430-2431, A. 372). Citizen's current use of two wire services would be reduced to one (Tr. 2431, A. 372). Citizen also would be required to reduce the size of its news reporting and editorial staff (Tr. 2431, A. 372). Citizen's Saturday magazine, an important editorial feature, would probably have to be eliminated, because it even now does not support itself in advertising revenue and constitutes a large expense (Tr. 2431-2432, A. 372). To further reduce expenses, it would be necessary for Citizen to contract for cheaper and fewer features on the editorial page, the women's page, the financial page, and the like (Tr. 2432, A. 372). This reduction of expenses in the news and editorial departments would have an impact on the other aspects of Citizen's business (Tr. 2432-2433, A. 373; F. 65, F. 66, F. 68). The evidence was that a reduction in news and editorial expenses would

29. The evidence was that Star, because of its superior financial condition and the likelihood that it will be the ultimate survivor, could attract the best advertising department personnel (Tr. 1627-1629, A. 299).

lead to a loss of circulation; that would make Citizen less attractive to advertisers and lead to reduced advertising revenues, and this in turn would weaken the news and editorial content further, thus renewing the declining circle (Tr. 2432-2433, A. 373; Tr. 694-695; Tr. 847, 864-866, A. 234, 243).

On the income side, the evidence showed that Citizen would be unable to obtain additional revenue by raising its advertising rates (Tr. 2434, A. 375). Citizen could not justify an increase in rates without additional circulation and, even if rates were increased, Citizen's advertising customers would be attracted to the lower rates charged by Star (Tr. 2434, A. 375; Tr. 1873-1874, A. 326; Tr. 1992-1993, A. 348). On the other hand, should Citizen try to attract more advertisers by cutting rates, Star being in a stronger financial condition could easily meet and even exceed Citizen's rate cuts (ibid.). Citizen would also lose its portion of the substantial advertising revenues derived from the Sunday edition of *Star* (G.X. 2, A. 30, Stip.; Tr. 1867-1869; Tr. 2436-2438, A. 376).

The Court found that if each newspaper had its own advertising department the cost to advertisers would increase (F. 194). The undisputed evidence showed that the resulting increase in milline rates to advertisers would deprive the Tucson newspapers of much national advertising (Tr. 1311-1313) and would seriously weaken their competitive position as against other mass media in Tucson (Tr. 378-381; Tr. 1503-1505; Tr. 1525-1526; Tr. 1642-1643; F. 134, 138, 141, 142, 145, 147, 148, 149). These other mass media had already begun to make inroads on TNI's advertising revenues (F. 126, 167, 173-175; D.X. 52, Stip.; Tr. 1111-1113; D.X. 143c, A. 491, Tr. 2136, 2138; D.X. 145b, A. 492, Tr. 2129, 2130; D.X. 205, A. 512, Tr. 602-605).

The Court found that since 1952 there has been a substantial increase in the advertising media available in the Tucson area (F. 126). These media include weekly newspapers, radio, television, magazines, billboards, handbills and direct mailers (F. 127). Though other printed media available to the local Tucson advertisers have specialized coverage, they all sell advertising space in competition with TNI (F. 134, 135). Advertisers and advertising agencies in the Tucson area recognize that there is lively competition among all advertising media in Tucson (F. 138). They select media on the basis of comparative cost, among other factors (F. 140-142). Each of the major media employs national representatives to solicit national advertising in competition with TNI (F. 139), and national trade associations representing the respective media assist television stations, radio stations and salesmen of outdoor advertising to compete against the Tucson newspapers for the local and national advertising dollar (F. 146, 147, 149, 150).

The major media in Tucson have been successful in diverting local and national advertising from TNI (F. 167). In Tucson, total newspaper advertising revenues per household in 1964 were below the national average, while the combined advertising revenues per household for radio, television and outdoor advertising were well above the national average (D.X. 143c, A. 491, Tr. 2136, 2138). From 1956 to 1964, radio and television broadcast revenues in Tucson had increased more rapidly than TNI revenues from local and national advertising (F. 173).

Thus, if the provisions for a joint advertising and a joint circulation department are abrogated, Citizen will be cast adrift to compete not only with the stronger Star but with other mass media which have become an increasingly important competitive factor in Tucson. The impact of this

interindustry competition must be recognized where that impact, in fact, exists (see *United States v. Continental Can Co.* (1964) 378 U.S. 441, 452-456; *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 572).

In summary, the evidence showed that the operating agreement is still necessary today. It was undisputed that if the operating agreement should be revised so as to require Citizen and Star each to operate its own separate advertising, circulation and business departments and require TNI to distribute its revenues to its owners on an advertising lineage and circulation basis, Citizen promptly would be forced into a losing position with little hope of long survival.

III.

THE DISTRICT COURT'S CONCLUSIONS THAT DEFENDANTS, BY ENTERING INTO AND PERFORMING THE OPERATING AGREEMENT, INTENDED TO AND COMBINED AND CONSPIRED TO MONOPOLIZE THE DAILY NEWSPAPER BUSINESS IN TUCSON WERE NOT SUPPORTED BY THE EVIDENCE AND WERE BASED SOLELY UPON THE ERRONEOUS AND PREJUDICIAL SUMMARY JUDGMENT THAT THE OPERATING AGREEMENT WAS PER SE ILLEGAL.

The Government charged that defendants, by entering into and performing the 1940 operating agreement, intended to and combined and conspired to monopolize the daily newspaper business in Tucson. The District Court accepted the Government's assertions that once the operating agreement was held per se illegal as "price fixing," "profit pooling" and "market allocation," the Court also must find an unlawful intent and conspiracy to monopolize (Plaintiff's Post-Trial Brief, pp. 22-27, cf. M., pp. 10-11). It concluded that "in entering into the operating agreement" defendants did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L.

4). Otherwise stated, the Court concluded that defendants, "by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power" over the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L. 3).

The taint of the Court's ruling on summary judgment thus permeated the monopoly and conspiracy rulings, just as the Government said it would (A. 629).

A. No Monopolization.

At the outset, the Government is met by the rule that unlawful monopolization presupposes a market which will support commercial competition, whereas the evidence demonstrates that Tucson was not and is not such a market (*Union Leader Corp. v. Newspapers of New England, Inc.* (1 Cir. 1960), 284 F.2d 582, 583-584, certiorari denied (1961) 365 U.S. 567; *United States v. Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416, 430). In 1940, at least 15 years' experience had demonstrated that Tucson was not able to support two separate commercially competitive newspapers (supra, pp. 9-10, 42-44). Nor have the chances improved (Tr. 2443- 2444, 2446, A. 381, 382). Significantly, today no city in this country the size of Tucson supports two metropolitan newspapers operating separately on both commercial and journalistic levels (D.X. 63(a), A. 478, Tr. 715, 717; A. 618). Newspapers in much larger cities throughout the country have been forced either to merge completely or enter into operating agreements (D.X. 46, Tr. 2456; D.X. 61 for identification, Tr. 2045, 2097; Tr. 2094-2097; Manno Aff., A. 118; Tr. 734, A. 167; Tr. 1185, 1188-1189).

B. No Conspiracy or Intent to Monopolize.

Regardless of the impossibility of unlawful monopolization where continuing competition is impossible, and far from revealing any specific intent to monopolize a competitive market, the record demonstrates that defendants were motivated by legitimate aims, both in accomplishing the merger in 1940 and later in the exercise of the right of first refusal in 1964.

In 1940, the parties entered the operating agreement in the express belief that experience had shown that the Tucson area could not profitably support two commercially competing newspapers (F. 21, 22). Yet their purpose was to adopt a plan which would ensure for the community, through merging of the commercial and mechanical operations, the continuation of fully independent and competitive news and editorial services.[30] They copied their agreement from similar operating agreements then and still in effect in Albuquerque and El Paso (Tr. 652-656, A. 149; Tr. 768-769, A. 181; Tr. 794-795, A. 201; Tr. 815; Tr. 868, A. 245; F. 21). They knew that competing newspapers in Phoenix had merged entirely (Tr. 769-770, 781, A. 182, 191). Counsel advised them it was proper to enter the agreement, and there was no suggestion that they might be violating the antitrust laws (Tr. 781, A. 191; Tr. 815, A. 215).

In the years since 1940, appellants had no reason to believe their operating agreement was unlawful (Tr. 2428, A. 370). They knew that similar agreements had been put into effect, apparently without antitrust challenge, in other cities, such as Nashville, Tulsa, Evansville, Lincoln, Birmingham, Knoxville, Columbus, Salt Lake City, Pittsburgh,

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30. G.X. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 774-778, A. 186; Tr. 795, A. 202; D.X. 181, Stip.; D.X. 185, A. 510, Tr. 1883, 1887, 2006; D.X. 186, A. 511, Tr. 2003A, 2009; F. 23.

Madison, Honolulu and San Francisco (D.X. 181, Stip.; Tr. 2428, A. 370). The Government admits that this is the first time it has litigated such an agreement (supra, p. 29).

Under these circumstances, defendants did not have the specific wrongful intent required by law as a condition precedent to a ruling against them on the section 2 charges (*Times-Picayune v. United States* (1953) 345 U.S. 594, 623-624, 627; *Swift and Company v. United States* (1905) 196 U.S. 375, 396).

Defendants, of course, knew that the operating agreement, by merging the commercial operations of the two newspapers, would end a dwindling struggle as to those functions which had depleted Citizen's resources (G.X. 26, A. 406, Tr. 282; Tr. 784, A. 193; Tr. 809-811, A. 211; G.X. 26, A. 406). They also knew that in 1940, there would have to be some slight increase in TNI's advertising rates, after its first year of operation, to offset the accumulated losses of Citizen and to make the operation profitable (F. 38; G.X. 25, p. 2—TNI—1939, Tr. 278).[31] But this is not the type of conduct condemned by section 2 (*Times-Picayune v. United States* (1953) 345 U.S. 594, 623-624, 626-627; *Union Leader Corp. v. Newspapers of New England, Inc.* (1 Cir. 1960) 284 F.2d 582, 589, certiorari denied (1961) 365 U.S. 567; *United States v. Jerrold Electronics Corporation* (E.D. Pa. 1960) 187 F.Supp. 545, 567-568, affirmed (1961) 365 U.S. 567). The District Court's conclusions on the alleged intent, combination, and conspiracy to monopolize are clear-

31. As of December 31, 1940, six months after the operating agreement became effective, Citizen Publishing still owed its stockholders over $101,500. Current liabilities were $43,864, current assets $3,525. Total liabilities exceeded total assets, exclusive of goodwill, by some $93,700 (D.X. 1e, Stip.). Two years later, as of December 31, 1942, Citizen Publishing's total liabilities still exceeded total assets exclusive of goodwill by some $35,663 despite significant savings attained through the operating agreement (D.X. 1g, Stip.).

ly error, and should be reversed (e.g., *Times-Picayune v. United States* (1953) 345 U.S. 594, 626-627).[32]

IV.

IF THE JUDGMENT BELOW IS AFFIRMED, THE ORDER OF DIVESTITURE SHOULD BE MODIFIED TO ALLOW APPELLANT SMALL TO DIVEST HIMSELF OF EITHER CITIZEN OR STAR, FOR OTHERWISE THE ORDER WILL BE UNDULY HARSH.

The District Court ruled that the acquisition of Star Publishing by Arden Publishing in 1965, upon the exercise by the Smalls of their rights under the 1940 stock option agreement, "was an acquisition by one corporation engaged in commerce of another corporation engaged in commerce and was a violation of section 7 of the Clayton Act" (C.L. 7). It ordered divestiture of Star, either by Arden Publishing selling the assets of Star, or by Small selling and disposing of all his stock in Arden Publishing (A. 102).

Appellants do not concede there was a violation of the Clayton Act, since the option was exercised solely to protect Citizen against an incompatible relationship with Brush-Moore in the operating company, and with a view to the prompt disposition of Star to other, outside publishers (supra, pp. 18-19). However, divestiture does not pose to appellants any significant problem as long as the operating agreement remains substantially intact. For this reason, appellants do not oppose the order of divestiture if the

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32. The District Court also concluded that the acquisition of Star by the Smalls in 1965 was "in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson" (C.L. 5). Since the stock agreement was considered as a part of the operating agreement (F. 48), this conclusion by the District Court is tainted by the ruling on summary judgment and is in error for the same reasons as the Court's holding that the operating agreement itself was illegal. Further, the evidence was that the acquisition of Star was made without the intent to monopolize (supra, pp. 16-20).

judgment of the District Court is reversed on the section 1 and section 2 issues.

But if the judgment below is affirmed on the section 1 and 2 issues, the order of divestiture will become unduly harsh, because the District Court will not be able to restore the two newspapers to their status quo prior to the acquisition and, more importantly, because the evidence demonstrates that if the operating agreement is modified as directed by the Court, Citizen will once again become a failing company.

There is no requirement that separation of the two newspapers should be made more difficult than necessary for appellant Small, if the operating agreement is to be modified (*United States v. Pullman Co.* (E.D.Pa. 1944) 53 F.Supp. 908, 908-909). As Justice Reed noted almost 20 years ago:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available" (*Timken Co. v. United States* (1951) 341 U.S. 593, 603 (concurring opinion)).

The fair solution in such circumstances would be to allow appellant Small to divest himself of either Star or Citizen at his option, rather than to force sale of the stronger paper and leave him with the one headed for failure. If, as the Government assumes, competition will be restored by the divestiture, it cannot reasonably contend that Small's divestiture of Citizen would have a greater, or different, impact on competition than his divestiture of Star.

CONCLUSION

The judgment of per se illegality of the operating agreement should be reversed and the cause remanded with directions that judgment upon the charges pertaining to sections 1 and 2 of the Sherman Act be entered for appellants, and that appellants Arden Publishing Company and William A. Small, Jr., be permitted promptly to dispose of their interests in Star as intended by them, subject to the continuing jurisdiction and supervision of the Court below.

Respectfully submitted,

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